80-275

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

ROBERT MICHAEL DAVIS AND THE
IRVING PROFESSIONAL FIREFIGHTERS ASSOCIATION,
Petitioners,

VERSUS

LEWIS WILLIAMS, THE IRVING FIREMEN'S AND
POLICEMEN'S CIVIL SERVICE COMMISSION AND
THE CITY OF IRVING, TEXAS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether certain catchall provisions of a municipal ordinance and of fire department regulations which mandate suspension or discharge of employees for engaging in "conduct prejudicial to good order" are vague, overbroad or otherwise facially unconstitutional.

INDEX

Page

Questions Presented v

Citations iii

Opinion Below 2

Jurisdiction 2

Applicable Rules, Regulations & Ordinances 2

Statement of the Case 4

The Factual Background 4

Statement of the Proceedings in the Court Below 5

Reasons for Granting the Writ 7

1. There is a conflict among the Circuit Courts of Appeals as to whether catchall regulations such as those proscribing "conduct prejudicial to good order" violate a municipal employee's constitutional rights to free speech and due process 7

2. The decision below raises significant and recurring problems regarding the exercise of free speech and due process rights in the public employment context 12

Conclusion 14

INDEX CONTINUED

Page

Certificate of Service 15

Appendix A-1

CITATIONS

Page

Cases

Allen v. City of Greensboro, 452 F. 2d 489 (4th Cir. 1971) 12

Arnett v. Kennedy, 416 U.S. 134 (1974) 8, 9, 10, 11

Bence v. Breier, 501 F. 2d 1185 (7th Cr. 1974) 7, 8, 10, 11

City of Wichita Falls v. Fowler, 555 S.W. 2d 920 (Civ. App. - Fort Worth 1977, no writ) 7

Colten v. Kentucky, 407 U.S. 104 (1972) 11

Davis v. Williams, 598 F. 2d 916 (5th Cir. 1979) 6, 11, 12

Fisher v. Walker, 464 F. 2d 1147 (10th Cir. 1972) 11, 12

Hamtramack Civil Service Commission v. Pitlock 44 Mich. App. 410, 205 N.W. 2d 293 (1973) 7

Janusaitis v. Middleberry Volunteer Fire Department, 607 F. 2d 17 (2nd Cir. 1979) 11, 12

Meehan v. Macy, 392 F.2d 822 (D.C. Cir. 1968) 11, 12

Parker v. Levy, 417 U.S. 733 (1974) 8, 9, 10

Phillips v. Adult Probation Department of San Francisco, 491 F. 2d 951 (9th Cir. 1974) 11, 12

CITATIONS CONTINUED

Page

Cases

Pickering v. Board of Education, 391 U.S. 563 (1968) 10

Sponick v. City of Detroit Police Department, 49 Mich. App. 162, 211 N.W. 2d 674 (1973) 7

Walters v. Peterson, 495 F. 2d 91 (D. C. Cir. 1973) 12

Statutes

28 U.S.C. § 1254 (1) 2

42 U.S.C. § 1983 5

Articles

53 Tex. L. Rev. 1298 (1975) 10

QUESTION PRESENTED

Whether certain catchall provisions of a municipal ordinance and of fire department regulations which mandate suspension or discharge of employees for engaging in "conduct prejudicial to good order" are vague, overbroad or otherwise facially unconstitutional.

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LEWIS WILLIAMS, THE IRVING FIREMEN'S AND
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THE CITY OF IRVING, TEXAS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners Robert Michael Davis and the Irving Professional Fire Fighters' Association respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 19, 1980.

OPINION BELOW

The *en banc* opinion of the Court of Appeals, not yet reported, appears in the appendix attached hereto. (Appendix p. 1). The panel opinion of the Court of Appeals appears at 598 F. 2d 916. No opinion was rendered by the District Court for the Northern District of Texas. However, the District Court did issue Findings of Fact, Conclusions of Law and a Ruling which appear in the Appendix attached hereto. (Appendix p. 11).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 19, 1980. This petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

APPLICABLE RULES, REGULATIONS AND ORDINANCES

IRVING DEPARTMENT OF FIRE RULES & REGULATIONS

* * * * *

ARTICLE 5.5 OFFENSES

Offenses are punishable by reprimand, reduction in rank, suspension, or dismissal.

A. Offenses

* * * * *

(5) Conduct prejudicial to good order.

* * * * *

ORDINANCE NO. 2201 CITY OF IRVING, TEXAS

* * * * *

SECTION 37. GROUNDS FOR REMOVAL OR SUSPENSION

* * * * *

(8) Conduct prejudicial to good order;

STATEMENT OF THE CASE

THE FACTUAL BACKGROUND

In the summer of 1975, the City Council of Irving, Texas began to explore the possibility of having Firemen operate an emergency ambulance service. After an initial decision to proceed with the project the City Council became enmeshed in a public controversy over the number of additional firemen that would be required to implement the project. Understandably, the Irving Professional Firefighters' Association (hereinafter referred to as the Association) took an active interest in this public dialogue. The members of the Association, including Petitioner Davis, the Association President, undertook to gather and present to the Council facts and figures supporting their position that a substantial number of new firemen would have to be hired in order to operate the service effectively. However, Respondent Williams, the Irving Fire Department Chief, took a different view and advised the Council that only a minimal increase in fire department personnel would be necessary.

At the regular monthly meeting of the Association, held on October 5, 1976, the membership voted to send a letter to Chief Williams expressing their concern with his views on the issue and generally urging him to reconsider his position. Moreover, it was decided that copies of the letter would be sent to each member of the City Council and the local newspaper in order to more effectively advance the Association's views.

The local news media, however, became aware of the Association's plan before the letter was actually released and Petitioner Davis was contacted by a reporter from the Irving Daily News for comment. On October 7, 1976, an article appeared on the front page of the Irving Daily News featuring quotations from Davis which were critical of the Chief's position

on the ambulance controversy and other departmental matters.

Chief Williams immediately sought legal advice from the city attorney regarding his power to discipline Davis for his comments. On October 12, 1976, Davis was indefinitely suspended by Chief Williams for violation of the above referenced city ordinance and fire department regulations which proscribe "conduct prejudicial to good order." Davis' criticism of the Chief in the press was the sole reason given for the suspension.

STATEMENT OF THE PROCEEDINGS IN THE COURT BELOW

On October 20, 1976, Davis and the Association joined in a Complaint under 42 U.S.C. § 1983 against Chief Williams, the Irving Fireman's & Policeman's Civil Service Commission and the City of Irving, Texas (hereinafter collectively referred to as the City) contending that the subject ordinance and regulations were unconstitutional under the first and fourteenth amendments. The District Court agreed and struck down the provisions as unconstitutionally vague and overbroad, both facially and as they had been applied to Davis. It therefore enjoined future enforcement of the ordinance and regulations and ordered Davis reinstated, with costs and attorney's fees.

On its appeal to the United States Court of Appeal for the Fifth Circuit the City complained only of that portion of the judgment which struck down as facially unconstitutional the regulation and ordinance against "conduct prejudicial to good order." The City chose not to attack the District Court's judgment that the subject provisions had been unconstitutionally applied to Petitioner Davis.

A Fifth Circuit panel, consisting of Circuit Judges Gewin, Gee and Rubin, heard the City's appeal and, on July 11, 1979,

issued an opinion affirming the District Court's judgment with Judge Gee dissenting. *Davis v. Williams*, 598 F. 2d 916 (5th Cir. 1979). Thereafter, the City filed its Petition for Rehearing *En Banc*. The Petition was granted and the case set for oral argument *en banc*. The sole issue remained: was the language in the subject provisions which proscribed "conduct prejudicial to good order" so facially vague and overbroad as to be repugnant to the Constitution. On May 19, 1980, Judge Gee issued a decision which reversed the District Court's ruling on facial invalidity. (Appendix p. 1). Judge Rubin, dissenting, forcefully restated the position he had taken in his panel opinion that the City's rules were void on their face. Six Circuit Judges concurred in this dissent.

REASONS FOR GRANTING THE WRIT

1. There is a conflict among the Circuit Courts of Appeal as to whether catchall regulations such as those proscribing "conduct prejudicial to good order" violated a municipal employee's constitutional rights to free speech and due process. 1/

The Fifth Circuit's decision in the case at bar directly conflicts with an earlier opinion issued by the Seventh Circuit in *Bence v. Breier*, 501 F. 2d 1185 (7th Cir. 1974), which struck down as facially void a catchall regulation promulgated by the Milwaukee Police Department. There, the Milwaukee Police Department had inadvertently failed to pay Plaintiff Bence for overtime he had worked. Bence, who was the President of the Milwaukee Professional Policeman's Protective Association, sent a letter to the City's Chief labor negotiator concerning the City's failure to compensate for overtime and other grievances. In addition, Bence posted copies of this letter on the bulletin boards of various Milwaukee Police Stations. Bence's actions were apparently contrary to a Police Department rule which dictated that grievances be initiated through departmental channels. Consequently, he was officially reprimanded under a catchall regulation which proscribed "conduct unbecoming an officer and detrimental to the service" and the reprimand was made a part of his personnel record. In

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1/ Significantly, there is also a conflict of opinion among the state courts as to the validity of catchall regulations such as the one involved in the case at bar. Compare *Hamtramck Civil Service Commission v. Pitlock*, 44 Mich. App. 410, 205 N.W. 2d 293 (1973) and *Sponick v. City of Detroit Police Department*, 49 Mich. App. 162, 211 N.W. 2d 674 (1973) with *City of Wichita Falls v. Fowler*, 555 S.W. 2d 920 (Civ. App. Fort Worth 1977, *No Writ*).

federal District Court, Bence successfully argued that the City's catchall regulation was facially void for vagueness. On appeal, the Seventh Circuit affirmed.

The fact pattern in ***Bence*** is substantially the same as in the case at bar. The catchall regulation promulgated by the City of Irving is equally as vague, if not more so, than Milwaukee's proscription against "conduct unbecoming an officer and detrimental to the service." Nevertheless, the two Circuits reached inconsistent results on the issue of facial invalidity which, of course, presents this Court with a direct conflict of opinion requiring resolution.

In particular, the Seventh and Fifth Circuits disagreed upon the proper scope of this Court's decisions in ***Arnett v. Kennedy***, 416 U.S. 134 (1974) and ***Parker v. Levy***, 417 U.S. 733 (1974). In ***Arnett v. Kennedy***, the Court upheld the discharge of a federal civil servant under a congressional statute authorizing dismissal for "such cause as will promote the efficiency of the service." The Court seemed to restrict the ***Arnett*** holding, however, by stressing that the interpretive history of the civil service statute had narrowed its concededly broad scope. ***Arnett*** 416 U.S. at 160-161. In addition, the Court emphasized that government legal counsel was available to advise federal civil servants on the meaning of the provision. ***Arnett***, 416 U.S. at 160. Finally, the Court noted that this admittedly general provision was necessary in order to give myriad different federal employees performing widely disparate tasks a common standard of job protection. ***Arnett*** 416 U.S. at 159.

In the ***Parker*** case the Court upheld the criminal conviction of a military officer under catchall provisions in the Uniform Code of Military Justice prohibiting "conduct unbecoming an officer and a gentlemen" and "all disorders and neglects to the prejudice of good order and discipline in the armed forces." Although the provisions were admittedly broad several unique

factors tipped the balance in favor of validity. For instance, the Court stressed that each provision had been :

> "Construed by the United States Court of Military Appeals or by other military authorities in such a manner as to at least partially narrow its otherwise broad scope.
>
> * * * * *
>
> The effect of these constructions of Articles 133 and 134 by the Court of Military Appeals and by other military authorities has been twofold: it has narrowed the very broad reach of the literal language of the articles and at the same time has supplied considerable specificity by way of examples of the conduct which they cover. *Parker* 417 U.S. at 752.

The Court concluded that there "cannot be the slightest doubt that under the military precedents there is a substantial range of conduct to which both provisions clearly apply without vagueness or imprecision." 417 U.S. at 754. In Addition, it was noted that military personnel were instructed regarding the contents and interpretation of the Code. *Parker* 417 U.S. at 751-752. Finally, the Court found that, because of the factors distinguishing military society from civilian society, a greater presumption of validity attaches to military rules. *Parker* 417 U.S. at 756.

The Seventh Circuit, and the dissenting Fifth Circuit Judges in *Davis*, recognized the implication in both *Arnett* and *Parker* that catchall regulations are inherently overbroad and vague absent sufficient limitation or guidance regarding their scope. Such limitations and guidelines are factors to be considered in balancing "the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the

efficiency of the public services it performs through its employees" as required by this Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968). In neither *Bence* nor *Davis* were there any limiting regulations, bodies of doctrine or offices for interpretive guidance as in *Parker* and *Arnett*. Furthermore, the catchall regulations in *Bence* and *Davis* applied to civilians and not military personnel. Finally, the substantially identical regulations in *Bence* and *Davis* were designed to apply to a small and essentially homogenous group of employees performing essentially similar job functions as opposed to *Arnett's* army of federal civil servants with disparate duties.

The Seventh Circuit, and the dissenting Fifth Circuit Judges in *Davis*, felt that the absence of the types of limitations and quidelines found in *Arnett* and *Parker* militated against the validity of the subject regulations. In contrast, however, Judge Gee, for the Fifth Circuit majority, found the facts in *Parker v. Levy* and *Arnett v. Kennedy* to be so similar to those in *Davis* that he felt obliged to completely dispense with the balancing of interests required by this Court in *Pickering:* "We are spared that task because the Court has already performed it in bookend situations, *Levy* and *Kennedy*." (Appendix p. 6). Judge Rubin, who wrote for six dissenting Circuit Judges, vehemently disagreed with Judge Gee and followed the reasoning of the Seventh Circuit in concluding that both *Arnett* and *Parker* were readily distinguishable from the case at bar 2/

2/ **Judge Rubin is not alone in finding the Seventh Circuit's reasoning persuasive. See Note "CONSTITUTIONAL LAW - Vagueness Doctrine - Police Departmental Regulation Proscribing 'Conduct Unbecoming an Officer' is Void for Vagueness. *Bence v. Breier.*" 53 TEX. L. REV. 1298 (1975).**

The Circuit Courts of Appeal also conflict on the issue of the proper burden to be borne by the government in defending imprecise regulations under the vagueness doctrine. In *Bence*, the Seventh Circuit explicitly rejected a standard established by the D.C. Circuit in an earlier case:

> "Precisely because the 'root of the vagueness doctrine is a rough idea of fairness,' *Colten v. Kentucky* 407 U.S. 104 (1972), we take issue with the pronouncement in *Meehan v. Macy*, 392 F. 2d 822, 835 (D.C. Cir. 1968), *mod.* 425 F. 2d 469 (1968), *aff'd en banc* 425 F. 2d 472 (1969), that 'it is not feasible or necessary for the government to spell out in detail all that conduct which will result in retaliation.' Rather, we think a more correct interpretation of the law is that it is necessary insofar as it is feasible for the government to delineate for its employees all conduct which might result in sanctions." *Bence* 501 F. 2d at 1189.

In contrast, the Fifth Circuit in *Davis* adopted the D. C. Circuit's doctrine of impractibility enunciated in the *Meehan* case, noting that "it may well be impossible for the mind to imagine or the hand to transcribe every sort of human misconduct that might fairly call for discipline." (Appendix p. 5). Decisions from the Second Circuit, *Janusaitis v. Middleberry Volunteer Fire Department*, 607 F. 2d 17 (2nd Cir. 1979), Ninth Circuit, *Phillips v. Adult Probation Department*, 491 F. 2d 951 (9th Cir. 1974) and Tenth Circuit, *Fisher v. Walker*, 464 F. 2d 1147 (10th Cir. 1972) also conflict with the Seventh Circuit's decision in *Bence* and adhere to the position taken by the D. C. and Fifth Circuits on this issue.

The conflict of opinion on the constitutional question presented this Court urgently requires resolution. Given the absence of uniformity which now prevails, the First Amendment rights of municipal firemen, policemen and other non-federal public employees vary in accordance with the geographi-

cal boundaries of the Circuit Courts. Rights of constitutional magnitude should not be made to turn on such arbitrary distinctions. Accordingly, these conflicts justify the grant of certiorari to review the judgment below.

2. The decision below raises significant and recurring problems regarding the exercise of free speech and due process rights in the public employment context.

The foregoing evidences a considerable lack of uniformity among the Circuit Courts of Appeal on the question presented this Court. Indeed, there is even a marked conflict of opinion among the Circuit Judges of the Fifth Circuit on this issue. Thus, the question raised by *Davis v. Williams* is obviously of great importance to the lower courts.

Aside from the perplexing legal issue, however, the case at bar also poses a question of considerable practical significance to public employers and employees. This was underscored when both the City of San Antonio and the State of Texas sought permission to file briefs as amicus curiae in the court below. Of course, governmental entities at all levels continue to utilize catchall regulations such as those proscribing "conduct prejudicial to good order." 3/ The common, if not increasing, use of such questionable regulations is a compelling reason why this Court should resolve the question raised by the case *sub judice*.

3/ This is evidenced by the great number of lower court decisions which address the constitutionality of catchall regulations *as applied*, e.g., *Janusaitis v. Middleberry Volunteer Fire Department*, 607 F. 2d 17 (2nd Cir. 1979); *Phillips v. Adult Probation Department of San Francisco*, 491 F. 2d 951 (9th Cir. 1974); *Waters v. Peterson*, 495 F. 2d 91 (D. C. Cir. 1973); *Fisher v. Walker*, 464 F. 2d 1147 (10th Cir. 1972); *Allen v. City of Greensboro*, 452 F. 2d 489 (4th Cir. 1971); *Meehan v. Macy*, 392 F. 2d 822 (D.C. Cir. 1968), *mod.* 425 F. 2d 469, *aff'd en banc* 425 F. 2d 472.

The confusion generated by the question at hand, however, is probably of greatest concern to those who must continue to work under such impalpable standards of conduct. These employees, along with their employers and the lower courts, urgently need the guidance of this Court in resolving the question presented.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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BY: Frederick M. Baron per ts
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CERTIFICATE OF SERVICE

I, FREDERICK M. BARON, hereby certify that I served a true and correct copy of the foregoing Writ of Certiorari on counsel for all parties to this appeal, by mailing copies thereof by ordinary postage, prepaid addressed to Mr. Donald J. Rorschach, City Attorney, 825 West Irving Boulevard, Irving, Texas 75060, Attorney for Respondents.

Frederick M Baron per m a.s

FREDERICK M. BARON

ATTORNEY FOR PETITIONERS

APPENDIX

DAVIS v. WILLIAMS

5792

ROBERT MICHAEL DAVIS et al.,
Plaintiffs-Appellees,

v.

LEWIS WILLIAMS et al.,
Defendants-Appellants

No. 77-1299

United States Court of Appeals,
Fifth Circuit

May 19, 1980

Appeal was taken from judgment of the United States District Court for the Northern District of Texas, William M. Taylor, Jr., J., in action challenging fire department rules. The Court of Appeals, 598 F. 2d 916, upheld determination that one rule was facially invalid. On rehearing, the Court of Appeals, Gee, Circuit Judge, held that rule prohibiting conduct prejudicial to good order was not facially invalid.

Reversed.

Thomas A. Clark, Circuit Judge, filed a specially concurring opinion.

Alvin B. Rubin, Circuit Judge, filed a dissenting opinion in which Godbold, Kravitch, Frank M. Johnson, Jr., Hatchett, Tate, and Sam D. Johnson, Circuit Judges, joined.

1. Municipal Corporation Key 198(2)

Fire department rule against conduct prejudicial to good order would be viewed as applying to undesirable conduct not specifically forbidden by other, more specific rules but of the same general kind.

2. Master and Servant Key 30 (1)

In private employment, one can be disciplined or discharged for almost any reason or for no reason.

3. Constitutional Law Key 82 (11)

In determining validity of rule prohibiting public employees from engaging in conduct prejudicial to good order, court must analyze the character of the employment concerned and the strength of the governmental interest in regulating the conduct of the employee in the manner chosen, balancing the interests of the employee as citizen against the government's need to control him as an employee.

4. Municipal Corporations Key 194

City fire department rule prohibiting conduct prejudicial to good order was not facially invalid.

Appeal from the United States District Court for the Northern District of Texas.

Before COLEMAN,Chief Judge, and BROWN, AIMSWORTH, GODBOLD, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT,

ANDERSON, RANDALL, TATE, SAM D. JOHNSON and THOMAS A. CLARK, Circuit Judges*

GEE, Circuit Judge:

Intransigence and a leavening of imprudence have transmuted this personnel controversy in the Irving, Texas, fire department into a constitutional one.

In 1976 the Irving city fathers decided to take over an ambulance sercive and have the fire department operate it. The local fire fighters' association, an appellee here, took the view that many new people would have to be hired to do this. Appellant Williams, the fire chief, thought only a few more would be needed. The matter became a public issue on which feelings within the department ran high.

Following a budget meeting at which Chief Williams defended his minimal hiring plan, the fire fighters' association held its own meeting and prepared an open letter to Williams, denouncing his leadership and accusing him, among other things, of gambling with their lives and those of the citizenry and of failing to stand up for the special interests of the fire fighters. Learning that this letter was being circulated for signatures, the local newspaper made for the troubled waters with baited hook. A reporter informed Williams of the impending letter. Williams declined comment before seeing it and called appellee Davis, the association's president. When Davis acknowledged circulation of the letter, Chief Williams reminded him of the existence of established grievance procedures.

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*Judge Goldberg was a member of the en banc court under 28 U.S.C.A. § 46(c) and participated in the oral argument of the case en banc. Since that time he has taken senior status and therefore does not participate in this decision. Judge Charles Clark did not participate in the consideration or decision of this case.

Next the reporter approached Davis, who obliged him with comments, based on the letter, that were bannered in next morning's paper:

IPFFA president Mike Davis said the "morale of the fire department has steadily dropped since the chief has assumed the leadership of the department more than eight years ago.

"We feel the chief has never really assumed his leadership responsibilities, and as a result of his eight years as chief, the morale of the department is at an all-time low.

"We realize this [the letter] is a serious measure and may permanently sever our relationship with the chief, but we wish to bring this situation to the attention of city management and the general public."

Chief Williams, feeling his authority and position traduced and intending to punish Williams if he could, consulted the city attorney for legal advice. He then suspended Davis indefinitely by a written order, which cited as its authority the following:

IRVING DEPARTMENT OF FIRE
RULES & REGULATIONS

ARTICLE 5.3 MEMBERS

* * * * * * * *

All members shall:

* * * * * * * *

41. Refrain from being a party to any malicious gossip, report, or activity that would tend to disrupt department

morale or bring discredit to the department or any member thereof; or making derogatory statements or adversely criticizing department policy, activities, or officers, except by written report to the Chief of the Department, through channels.

* * * * * * * *

ARTICLE 5.5 OFFENSES

Offenses are punishable by reprimand, reduction in rank, suspension, or dismissal.

A. Offenses

* * * * * * * *

(5) Conduct prejudicial to good order.

* * * * * * * * *

ORDINANCE NO. 2201 CITY OF IRVING TEXAS

* * * * * * * *

SECTION 37. GROUNDS FOR REMOVAL OR SUSPENSION

* * * * * * * *

(8) Conduct prejudicial to good order;

* * * * * * * *

The order then continued by reciting the facts leading up to

Davis' statements to the newspaper and quoting his comments set out above. It concluded:

In this article, a copy of which is attached hereto, Robert Michael Davis is quoted repeatedly criticising my leadership as Chief and making statements that have certainly tended to disrupt department morale.

Based upon an overall review of the conduct of Fire Equipment Officer II, Robert Michael Davis in this matter, including the violations of the Fire Department Rules and Regulations and City of Irving Ordinance No. 2201, I have given Fire Equipment Operator II, Robert Michael Davis an indefinite suspension for each such separate action and violation.

This suit followed, proceeding under 42 U.S.C. § 1983 and contending, among other things, that the above provisions are vague, overbroad, and facially unconstitutional under the first and fourteenth amendments. The district court held that they were unconstitutional, both facially and as they had been applied to Davis, 1/ It therefore enjoined enforcement of the

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1/ **The court's formal findings, so far as pertinent here, were:**

4. The court finds that Article 5.3 ¶ 41 and Article 5.5 ¶ 5of the Irving Fire Department Rules and Regulations and Ordinance 2201, Section 37 ¶ 8 of the City of Irving, Texas, are vague, overboard and otherwise facially unconstitutional in that they prohibit conduct protected by the First Amendment to the United States Constitution.

5. The Court finds that the said Regulations and Ordinances, as stated above, are being applied by the defendant, LEWIS WILLIAMS, in a manner so as to deprive the Plaintiffs of their rights protected by the First Amendment to the United States Constitution.

Its underlying reasons are made clear by its informal rulings from the bench:

In light of the authorities, *Arnett versus Kennedy*, 416 U.S.

provisions and ordered Davis' reinstatement, with costs and attorney's fees. On this appeal, Chief Williams, the commission, and the city (hereafter collectively referred to as the city) complain only of that portion of the judgment that holds facially invalid the rule and ordinance against "[c]onduct

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1/ Continued

134 [94 S. Ct. 1633, 40 L. Ed. 2d 15], I have concluded that this regulation is unconstitutional on its face and in its application in this case.

Now, certainly public employment carries with it certain limitations on one's right to speak, and the Supreme Court has spoken on that, but this regulation, I think, goes far beyond the limitations permitted under the *Arnett* case. This regulation just absolutely prohibits Irving firemen from making derogatory statements, whether those statements concern job issues or private matters or whether they are made to the press, to other firemen or to family members in the privacy of the home or anywhere. And what is a derogatory statement? That's a matter, I think, of vagueness and indefiniteness and doesn't provide sufficient guidance to ascertain standards of conduct that are prohibited.

* * * * * * *

MR. RORSCHACH: Your Honor, I may be interrupting but in addition to the rule you just cited, there is a rule which was set forth in the suspension "conduct prejudicial to good order" also. We need to find out whether that one is violative because that's part of the state statute.

THE COURT: I think it is for overbreadth and vagueness. And, of course, as I understand it, under the record in this case contrary to the good order - what's the language.

MR. RORSCHACH: Conduct prejudicial to good order.

THE COURT: Conduct prejudicial to good order. The only conduct was in conversation, as I understand it, which is the infringement of First Amendment rights and I do think its overbroad.

prejudicial to good order." 2/ We are thus to determine whether such a provision, as applied to the behavior of municipal fire fighters, is so vague or overbroad as to offend the Constitution. Our inquiry is somewhat narrowed, however, by the context of this case.

[1] In the first place, the city remains enjoined, by that portion of the judgment from which it did not appeal, from enforcing article 5.3 (41), 3/ that portion of the rules most offensive to the first amendment. In the setting of this case, therefore, the provisions of article 5.3(41) must be viewed as substracted from the general catch-all ordinance, since, if they cannot be enforced as specific prohibition, no more can they be enforced as subsumed in a general one. Second, the catch-all prohibition comes to us not standing alone but rounding out a lengthy list of more specific provisions pertaining to such proscribed categories of conduct as "insubordination,""absent without leave," and the like. Obviously, it is not intended that the catch-all provision re-prohibit in general terms what other provisions of the rules have already forbidden in specific ones. Nor, if it were so intended, can we envision how it would add weight to a specific charge:

2/ Mr. Davis was long ago reinstated, with back pay; and the city describes its appeal, in its brief to us en banc, as perfected . . . to challenge the Trial Court's ruling that conduct prejudicial to good order' . . . is unconstitutional on its face." Thus, the city prudently abandons its attack on the conclusion of the court below that Mr. Davis could not, consistent with the first amendment, be disciplined under the municipal provisions concerned for sponsoring the firm but temperate criticism of Chief Williams reported in the newspaper and quoted above.

3/ The "derogatory statements-adverse criticism" provision quoted in text above.

"insubordination prejudicial to good order," for example, seems to amount to no more than "insubordination." We therefore conclude that the provision in these fire department rules condemning [c]onduct prejudicial to good order" is properly viewed as applying to undesirable conduct not specifically forbidden by other, more specific rules but of the same general kind. Thus it falls in the category of such venerable omnibus clauses as those punishing "conduct unbecoming an officer and a gentleman," art. 95 of the old Articles of War (presently brought forward as art. 133, Uniform Code of Military Justice), and art. 134 of that Code, punishing "disorders and neglects to the prejudice of good order and discipline . . . "4/

[2] As was noted in the dissent from our panel's opinion,5/ catch-all provisions such as this persist in military and civil-service codes, though often challenged and sometimes invalidated on grounds such as those asserted here. ***See, e. g., Bence v. Breier***, 501 F. 2d 1185 (7th Cir. 1974), and ***generally***, Note ***Vagueness Doctrine***, 53 Tex. L. Rev. 1298 (1975). The reason why they continue to appear seems manifest. For in private employment, one can be disciplined or discharged for almost any reason or for no reason; that this arrangement obtains is generally known. In civil-service employment, by contrast, discharge or discipline must rest on "cause." Fair notice consequently requires some attempt at specifying what actions constitute cause, but it may well be impossible for the mind to inagine or the hand to transcribe every sort of human misconduct that might fairly call for discipline. And if it were possible, the product would doubtless fill volumes of particulars

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4/ Arts. 133 and 134 appear at 10 U.S.C. §§ 933 and 934.

5/ From which we borrow liberally and sometimes literally, without further attribution. 598 F. 2d 916.

and therefore go unread - except perhaps by superiors searching out *ad hoc* grounds for disciplinary action already determined on.

Thus, ironically, these catch-all provisions, so often attacked on vagueness (due process) and overbreadth (first amendment) grounds, 6/ probably give the only notice that can practically and effectively be given that the employer thinks itself entitled to impose punishment on grounds that are not set out with particularity. They "require . . a person to conform his conduct to an imprecise but comprehensible normative standard." *Coates v. Cincinnati*, 402 U.S. 611, 614, 91 S. Ct. 1686, 1688, 29 L. Ed. 2d 214 (1971). For example, in *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974), the Supreme Court upheld a civil-service dismissal for "such cause as will promote the efficiency of the service." It did so on reasoning that the quoted standard was "essentially fair" and that requiring greater specificity was not feasible "because of the infinite variety of factual situations in which public statements by government employees might reasonably justify dismissal for 'cause.' " *Id.* at 161, 94 S. Ct. at 1648. And in *Parker v. Levy*, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974), the Court sustained against a vagueness challenge art. 134, Uniform Code of Military Justice, which contains language almost identical to that attacked here, forbidding "disorders and neglects to the prejudice of good order . . . " 7/ Were the Irving Fire Department a military unit, we would re-

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6/ Despite their different bases, the doctrines overlap considerably. See *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972), and *Smith v. Goguen*, 415 U.S. 566, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974).

7/ *See also Civil Service Commission v. Letter Carriers*, 413 U.S. 548 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973), upholding the Hatch Act's severe restrictions on political activity by federal employees against attack on, vagueness and overbreadth grounds, and *Broadrick v. Okla-*

gard *Levy* as controlling authority, closely in point, and would tarry no longer.

But the fire department is not such a unit. It is at most quasi-military and partakes even of this quality only or chiefly when on duty. The Court relied strongly in *Levy* on the military context and tradition, and we are loath to equate a municipal fireman with a paratrooper or even with such a quasi-soldier as the recalcitrant officer-dermatologist *Levy*. Military society, to function at all, appears inexorably to work itself out at least partly in terms of status and to require something more in terms of performance than mere efficiency, of conduct than mere failure to stampede the carriage horses. We do not, therefore, regard *Levy* as squarely controlling 8/ Kennedy, however, does not concern the military, and the catch-all language there upheld could scarcely be broader 9/

[3] It is necessary, in such cases as this, to analyze the character of the employment concerned and the strength of

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7/ Continued
homa, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 830 (1973), sustaining a similar state statute against like attacks. As the Court noted in a subsequent opinion., these trammelled activities are ones "lying at the core of the First Amendment." *Kelley v. Johnson*, 425 U.S. 238, 245, 96 S. Ct. 1440, 1445, 47 L. Ed. 2d 708 (1976).

8/ In a case involving the grooming code of a New York county police department, a more analogous unit to ours, the Court seemed to indicate that though such organizations may not be paramilitary in such a sense as to draw support for their codes from historical prescription, yet the choice by their sponsors of a militaty-type organizational structure as a practical administrative solution deserves deference. *Kelley v. Johnson*, 425 U.S. 238, 246, 96 S. Ct. 1440, 1445, 47 L. Ed. 2d 708 (1976).

9/ Nor was that language significantly limited in breadth by its two sets of accompanying regulations, each of which incorporated its own catchall provision against 'criminal, infamous, dishonest, immoral or

the governmental interest in regulating the conduct of the employee in the manner chosen, balancing the interests if the employee as citizen against the government's need to control him as employee. ***Pickering v. Board of Education***, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). It is certainly possible to isolate discrete elements within the analysis: size of the unit to be controlled; disparateness of function within it; the need for discipline, on or off the job; and so on. Such meticulous analysis and balancing is perhaps a task more appropriate for the Supreme Court than for us, especially where new ground is to be plowed in dangerous territory. 10/ Here, we conclude, we are spared that task because the Court has already performed it in book-end situations, *Levy* and *Kennedy*.

Levy, *supra*, upheld the criminal conviction and incarceration of a military officer for pure political speech under a statute fully as broad and vague (disorders and neglects to the prejudice of good order and discipline) as this ordinance. *Arnett*, *supra*, upheld against like attacks the discharge of a civil servant for publicly and recklessly charging his supervisor with misfeasance under a provision even boarder (such cause as will promote the efficiency of the service). Fireman Davis' relatively temperate and germane public expressions clearly fall in a different

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9/ Continued
notoriously disgraceful conduct, *or other conduct prejudicial to the Government.*" *Arnett v. Kennedy*, 416 U.S. at 141 nn. 5 and 6, 94 S. Ct. at 1638 nn. 5 and 6 (emphasis added).

10/ *See Brown v. Glines*, ____ U.S. ____, *100* S. Ct. 594, 62 L. Ed. 540 (1980), upholding against first amendment attack a prior restraint on a serviceman's circulation on base of a petition.

category from these; 11/ and, as we have noted, the city authorities wisely did not bring to us the issue of whether the ordinance, as applied to punish these, was infirm or whether the specific provision against derogatory statements or adverse criticism was valid - either facially or as applied to Mr. Davis.

[4] But the Irving catchall rule and ordinance condemning conduct by firemen prejudicial to good order cannot, in view of the authorities we have considered and discussed, be held facially - always and however applied - invalid. Clearly it falls somewhere on the spectrum between *Arnett* and *Levy*. To strike it down, therefore, would require a departure that is beyond our powers. The judgment of the district court, insofar only as it declares this provision facially unconstitutional and enjoins its enforcement in any manner, must therefore be

REVERSED.

THOMAS A. CLARK, Circuit Judge, specially concurring:

I concur in the result and in most of the reasoning of the majority opinion en banc. The language of the dissent to the panel opinion, 1/ however, emphasizing the very small degree to which first amendment considerations are implicated in the posture of the case as it reaches us, more closely expresses my views. I therefore adopt it as mine.

ALVIN B. RUBIN, Circuit Judge, with whom GODBOLD, KRAVITCH, FRANK M. JOHNSON, Jr., HATCHETT, TATE and SAM D. JOHNSON, Circuit Judges, join, dissenting.

11/ *Cf. Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979) (germane, if raucous, private expressions).

1/ 593 F. 2d at 922 - 924.

Respectfully, I dissent from the majority opinion. My brethren accept a limitation on the freedom of speech of municipal employees by a regulation consisting of a bare "catch-all provision" because it is the "only notice that can practically and effectively be given that the employer thinks [himself] entitled to impose punishment on grounds that are not set out with particularity." Generality of proscription may be tolerable when directed at conduct. However it cannot be sanctioned when it stifles freedom of expression. In accommodating the first amendment to the apparent needs of the government as employer, my brethren put a false dilemma: if the government authorities are to discipline employees they must either adopt a rule so vague that it gives no notice to employees or they must formulate an encyclopedia of particulars. The simple answer to the apparent riddle is easy: a governmental body is not required to inhibit the freedom of expression of its employees; if it seeks to do so, then it must warn clearly what exercises of first amendment rights so far abuse the employment relationship that they constitute cause for discipline.

The statement of facts in the majority opinion is completely accurate. It fails, however, to focus on the single most important subject: whether the ordinance applies when an employee engages in speech or other self-expression that is deemed by his superiors to be "prejudicial to good order." At the trial, in its brief and in oral argument the city asserts that speech can be thus condemned. Perhaps in recognition of the possible reach of that phrase, the majority limits it by a sort of *ejusdem generis* rule, "undesirable conduct not specifically forbidden by other, more specific rules but of the same general kind." The city can, of course, revise the ordinance so as to prohibit its application to constitutionally protected speech, but the legislative body has made no such effort, and instead defends the ordinance in its full Scope. Were we a state court, we could so reinterpret state codes, to attempt to bring them into constitutional line, but, as a federal court, we lack that power.

Gooding v. Wilson, 405 U.S. 518, 520, 92 S. Ct. 1103, 1105, 31 L. Ed. 2d 408, 413 (1972); *United States v. Thirty-seven (37) Photographs*, 402 U.S. 363, 369, 91 S. Ct. 1400, 1405, 28, L. Ed. 2d 822, 829 (1971).

Davis was not discharged for punching the chief in the nose, for damaging city property or for driving a fire truck with wild abandon. He was fired for talking to a newspaper reporter. He now knows that the ordinance was unconstitutional as applied to him. Other employees do not have the assurance that other speeches on other subjects will be similarly protected. When considering the validity of the ordinance on its face, we must consider not only whether it prohibits unruly actions but whether it might reach an attempt to express sentiments that do not meet with approval of a governmental superior. More important, the employee must consider before he speaks the possibility that he will be discharged or disciplined if he gives utterance to his thoughts. This inhibition is properly characterized as a chilling effect for it can hardly fail both to deter all but the bravest and to limit expression by others to the safe and the accepted.

The conduct-prejudicial-to-good-order standard, even when Article 5.5 is narrowed by eliminating whatever was forbidden by Article 5.3, is designed to forbid not only actual speech and writing but also behavior that is communicative and, hence, shielded by the first amendment. Municipal employees must not be discharged pursuant to a scheme that stifles the exercise of fundamental personal liberty. *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). The vice in the ordinance is that it is overbroad in reaching first-amendment-protected conduct, and vague in its definition of what kind of expressive conduct is or is not prohibited.

Whether such a general standard is so vague that it cannot

constitutionally be applied to government employees has twice been considered by the Supreme Court. Both cases are cited and relied upon by the majority. With deference to my brethren, I read them differently as applied to the issue before us. Neither of them sanctions proscriptions against free speech by phrases Delphic in brevity and obscurity.

In *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974), the Court considered a provision of the Lloyd-LaFollette Act, 5 U.S.C. § 7501, which provides that a federal civil service employee may be removed or suspended without pay "only for such cause as will promote the efficiency of the service." The statute was upheld on the premise that its language "excludes constitutionally protected speech, and that the statute is therefore not overbroad." 416 U.S. at 162, 94 S. Ct. at 1648, 40 L. Ed. 2d at 38. The Court emphasized the interpretative history of the statute, the availability of government counsel to employees who seek advice on the meaning of the act and its regulations, and the administrative interpretation of the statute by the Civil Service Commission, whose "longstanding principles of employer-employee relationship, like those developed in the private sector, should be followed in interpreting the language used by Congress." *Id.* at 160, 94 S. Ct. at 1647, 40 L. Ed. 2d at 36.

None of these buttresses supports this ordinance. There is no state court interpretation that safeguards constitutionally protected speech, there is no counsel to advise on the ordinance and there is no administrative history. Davis was discharged, and remained unemployed until he invoked the aid of a federal court; only then did he know that he was safe in speaking to a reporter. If his fellow firemen now wish to espouse wages considered horrendous by the chief, they have no assurance that this advocacy will not be considered prejudicial to good order.

Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d

439 (1974), lends no greater support to the ordinance. While the Court held valid provisions of the Uniform Code of Military Justice proscribing "conduct unbecoming an officer and a gentleman" (10 U.S.C. § 933) and "all disorders and neglects to the prejudice of good order and discipline in the armed forces," (10 U.S.C. § 934) it stressed that each of these articles had been:

> construed by the United States Court of Military Appeals or by other military authorities in such a manner as to at least partially narrow its otherwise broad scope.
>
> * * * * * * *
>
> The effect of these constructions of Arts. 133 and 134 by the Court of Military Appeals and by other military authorities has been twofold: It has narrowed the very broad reach of the literal language of the articles, and at the same time has supplied considerable specificity by way of examples of the conduct which they cover.

417 U.S. at 752, 754, 94 S. Ct. at 2560, 2560-61, 41 L. Ed. 2d at 456. The Court also noted that military personnel were instructed regarding the contents of the Code. *Id.* at 751-52, 94 S. Ct. at 2559, 41 L. Ed. 2d at 455. Moreover the Court stressed the "factors differentiating military society from civilian society" and held that the proper standard of review for a vagueness challenge to the articles of the Code is the standard that applies to criminal statutes regulating economic affairs. Id. at 756, 94 S. Ct. at 2562, 41 L. Ed. 2d at 457.

None of the factors that the *Arnett* and *Parker* opinions

mentioned as providing such limitation or guidance are found here. There are no limiting regulations; there is no body of doctrine; there is no office for interpretative guidance; the rule applies to fire department employees rather then military personnel, 1/ and no judicial construction of the ordinance and regulation can eliminate their overbreadth and also provide the requisite degree of clarity. *See Smith v. Goguen*, 415 U.S. 566, 580-81, 94 S. Ct. 1242, 1251, 39 L. Ed. 2d 605, 616 (1974); *Broadrick v. Oklahoma*, 413 U.S. 601, 617-18, 93 S. Ct. 2908, 2918-19, 37 L. Ed. 2d 830, 842-44 (1973); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 579-80, 93 S. Ct. 2880, 2897-98, 37 L. Ed. 2d 796, 816-17 (1973); *Bence v. Breier*, 501 F. 2d 1185, 1188-92 (7th Cir. 1974). *cert. denied*, 419 U.S. 1121, 95 S. Ct. 804, 42 L.Ed. 2d 821 (1975); *Waters v. Peterson*, 495 F. 2d 91, 99-100 (D. C. Cir. 1973). *See generally Note, Constitutional Law - Vagueness Doctrine*, 53 Tex. L. Rev. 1298 (1975). Certainly, the majority opinion has not done so. Therefore the ordinance and regulation are facially overbroad and vague. 2/

This dissent is not an indorsement of insubordination or anarchy in governmental service. Governmental as well as private administrative units must be responsive to management.

2/ The military analogy has been rejected with respect to police departments. *Bence v. Breier*, 501 F. 2d 1185 (7th Cir. 1974), *cert. denied* 419 U.S. 1121, 95 S. Ct. 804, 42 L. Ed. 2d 821 (1975); *Muller v. Conlisk*, 429 F. 2d 901, 904 (7th Cir. 1970). Fire departments are also not analogous to the military.

2/ We need not pause here to define the differences between these defects. *See, e. g., Coates v. City of Cincinnati*, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971), distinguishing the first amendment basis of the over-breadth doctrine from the due process grounding of the vagueness doctrine.

Policy makers must have the authority to define and accomplish functional goals. Administrators must have the power to direct work and to discipline the idle and the insolent. "[I]t is not feasible or necessary . . . to spell out in detail all that conduct which will result in retaliation." *Arnett v. Kennedy*, 416 U.S. 134, 161, 94 S. Ct. 1633, 1648, 40 L. Ed. 2d 15, 37 (1974) (quoting Meehan v. Macy,392 F. 2d 822, 835 (D. C. Cir.), *modified on rehearing*, 425 F. 2d 469 (1968), *aff'd en banc*, 425 F. 2d 472 (1969). However, certain minimum standards or guidlines are required. *See Smith v. Goguen*, 415 U.S. 566, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974). Management prerogatives can be defined in a manner that makes clear the duties and responsibilities of public employees and yet protects their rights as citizens, 3/ In an industrial society, suspension and discharge are penalties more severe than those levied for many criminal offenses; they cannot be left to the caprice of a supervisor, particularly when action may be taken, as it was against Davis, for communication protected by the first amendment. 4/

3/ The degree of specificity required of such regulations may depend on the nature of the employees covered. If a large, heterogeneous group of employees is involved, such as in Arnett,where most federal employees were subject to the regulations in question, less specificity may be feasible than for a small, homogeneous group of employees such as municipal firefighters. See generally Note, Constitutional Law -Vagueness Doctrine, 53 Tex. L. Rev. 1298 (1975).

4/ We cannot excuse unwillingness to face difficult, even unfamiliar, issues because the Supreme Court has not yet reached them. Certiorari review is reserved principally for conflicts of decision among the circuit courts. Until circuit courts wrestle with a constitutional problem and present in their opinions a full range of precedent and thought appropriate to its resolution, the highest court is not in a position to consider all facets of the problem and reach an informed disposition.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
No. CA 3-76-1394-C

ROBERT MICHAEL DAVIS AND THE IRVING PROFESSIONAL FIREFIGHTERS ASSOCIATION
Plaintiffs

v.

LEWIS WILLIANS, THE IRVING FIREMEN'S AND POLICEMEN'S CIVIL SERVICE COMMISSION AND THE CITY OF IRVING TEXAS

The above case come on to be tried before the Court without a Jury on the 5th day of November, 1976, with all parties and their attorneys present. After considering the pleadings, the evidence, the argument and briefs from counsel, the Court files herewith its findings of fact and conclusions of law.

FINDING OF FACT

1. Plaintiff, ROBERT MICHAEL DAVIS, is a resident of Irving, Dallas, County, Texas, and prior to the date of his discharge, was employed by the City of Irving, Texas, as a fireman.

2. Plaintiff, THE IRVING PROFESSIONAL FIRE FIGHTERS ASSOCIATION, is an unincorporated association composed of employees of the City of Irving Fire Department.

3. On October 12, 1976, Plaintiff DAVIS received notice from Defendant LEWIS WILLIAMS, the Chief of the Irving Fire Department, that he had been indefinitely suspended, effective 8:01 a.m. October 13, 1976 for violation of the following Rules and Regulations of the City of Irving Fire Depart-

ment and City Ordinances of the City of Irving:

IRVING DEPARTMENT OF FIRE
RULES AND REGULATIONS

ARTICLE 5.3: All members (employees) shall: (41) Refrain from being a party to any malicious gossip, report, or activity that would tend to disrupt department morale or bring discredit to the department or any members thereof; or making derogatory statements or adversely criticizing department policy, activities, or officers, except by written report to the Chief of the Department, through channels.

ARTICLE 5.5 Offenses punishable by suspension or removal: (5) Conduct prejudicial to good order.

ORDINANCE NO. 2201
CITY OF IRVING, TEXAS

SECTION 37: Grounds for suspension or removal: (8) Conduct prejudicial to good order.

4. The conduct complained of by Chief Williams in dismissing Plaintiff DAVIS was that DAVIS had orally criticized Chief Williams and that such criticism had been made to a reporter from the local newspaper and that such criticism was subsequently printed in the newspaper.

5. No other grounds have been alleged or shown as a basis for the termination of Plaintiff DAVIS. Defendant LEWIS WILLIAMS testified that the Ordinance and Regulations in question apply to prohibit any criticism of the Fire Department or personnel. Such criticism is prohibited while firemen

are on duty and while they are off duty.

6. The Chief further testified that the Regulations prohibit members of the Plaintiff Association from criticizing any aspect of the Fire Department during Union meetings held while firemen are off duty and not on City premises.

7. Chief Williams testified that "conduct prejudicial to good order" is any conduct that would tend to disrupt the operation of the fire department and that would include "anything that might change the thinking of the men or change their opinion of the leadership of the Fire Department."

8. Plaintiff ROBERT MICHAEL DAVIS appealed his termination to the Irving Firemen's and Policemen's Civil Service Commission and by Order dated November 17, 1976, the said Commission upheld the Chief's recommendation of termination.

9. Officers of the Plaintiff Organization testified that they are unsure of what actions they may take at Union meetings and what comments they may make concerning the Fire Department to members of the Press and other citizens.

10. Plaintiff ROBERT MICHAEL DAVIS has not been able to find work elsewhere of any continuing or substantial nature.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this cause pursuant to 28 U.S.C.A., Sections 1331 and 1343, and further, pursuant to 42 U.S.C.A., Section 1983 in that the Complaint seeks to redress the deprivation under color of statute, ordinance, regulation, custom or usage of a State, of rights, privileges, and immunities secured by the Constitution and Laws of the United States and that further, the matter in controversy,

exclusive of interest and costs, exceeds the sum of $10,000.00.

2. Jurisdiction is further vested in the Court pursuant to 28 U.S.C.A. Sections 2201 and 2202 this being a suit for Declaratory Judgment, declaring the unconstitutionality of certain municipal rules and regulations.

3. Venue in this case is proper in this Court pursuant to 28 U.S.C.A. Section 1391.

4. The Court finds that Article 5.3 ¶ 41 and Article 5.5 ¶ 5 of the Irving Fire Department Rules and Regulations and Ordinance 2201, Section 37 ¶ 8 of the City of Irving, Texas are vague, overbroad and otherwise facially unconstitutional in that they prohibit conduct protected by the First Amendment to the United States Constitution.

5. The Court further finds that the said Regulations and Ordinances, as stated above, are being applied by the Defendant, LEWIS WILLIAMS, in a manner so as to deprive the Plaintiffs of their rights protected by the First Amendment to the United States Constitution.

6. An actual controversy exists between the parties herein and the Plaintiffs will suffer immediate and irreparable harm by reason of the acts of Defendants unless this Court issues an Injunction. Plaintiffs have no adequate remedy at law.

IT IS THEREFORE ORDERED that the Defendants be and hereby are, enjoined against enforcing, in any manner, the following provision of the City of Irving Fire Department Regulations and of the Ordinances of the City of Irving:

IRVING DEPARTMENT OF FIRE
RULES AND REGULATIONS

ARTICLE 5.3 All members (employees) shall:

(41) Refrain from being a party to any malicious gossip, report, or activity that would tend to disrupt department morale or bring discredit to the department or any members thereof; or making derogatory statements or adversely criticizing department policy, activities, or officers, except by written report to the Chief of the Department. through channels.

ARTICLE 5.5 Offenses punishable by suspension or removal: (5) Conduct prejudicial to good order.

CITY OF IRVING, TEXAS

SECTION 37: Grounds for suspension or removal: (8) Conduct prejudicial to good order.

IT IS FURTHER ORDERED that the Defendants reinstate Plaintiff ROBERT MICHAEL DAVIS to his former position with the City of Irving Fire Department and make him whole, monetarily, and in all other ways, as a result of his termination.

IT IS FURTHER ORDERED that the Defendants pay all costs of Court incurred herein and further that they pay the sum of TWO THOUSAND DOLLARS ($2,000.00) to counsel for Plaintiffs as reasonable and necessary attorneys fees: in the event this case is appealed to the United States Court of Appeals, an additional TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00) shall be paid as attorneys fees and in the event said case shall be futher appealed to the United States Supreme Court, and additional TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00) shall be paid as reasonable and necessary attorneys fees for the prosecution of this action.

The above attorneys fees are awarded upon the condition that Defendants do not prevail upon appeal, if an appeal be taken.

W. M. TAYLOR
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA-3-76-1394

ROBERT MICHAEL DAVIS AND THE IRVING PROFESSIONAL FIREFIGHTERS ASSOCIATION
Plaintiffs

v.

LEWIS WILLIAMS, THE IRVING FIREMEN'S AND POLICEMEN'S CIVIL SERVICE COMMISSION AND THE CITY OF IRVING, TEXAS

RULING OF THE COURT

BE IT REMEMBERED THAT on the 29th day of November, A.D. 1975, before the Honorable W. M. Taylor, Jr., United States District Judge at Dallas, Texas, the following proceedings were had in the above style and numbered cause.

APPEARANCES:

Mr. Frederick M. Baron, Attorney at Law
8333 Douglas Avenue, Suite 1350
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Appearing for the Plaintiffs

Mr. Don J. Rorschach, City Attorney
and

Mr. John W. Chandler, Assistant City Attorney
City of Irving
824 West Irving Boulevard
Irving, Texas 75060
Appearing for the Defendants

PROCEEDINGS

* * * * * *

[P. 8, 1.21] (THE COURT) In the light of the authorities, ***Arnett versus Kennedy***, 416 U.S. 134, I have concluded that this regulation is unconstitutional on its face and in its application in this case.

Now, certainly public employment carries [9] with it cerlimitations on one's right to speak, and the Supreme Court has spoken on that, but this regulation. I think, goes far beyond the limitations permitted under the ***Arnett*** case. This regulation just absolutely prohibits Irving firemen from making derogatory statements, whether those statements concern job issues or private matters or whether they are made to the press, to other firemen or to family members in the privacy of the home or anywhere. And what is a derogatory statement? That's a matter, I think, of vagueness and indefiniteness and doesn't provide sufficient guidance to ascertain standards of conduct that are prohibited.

* * * * * *

[P. 10, l. 19] MR' RORSCHACH: Your Honor, I may be interrupting but in addition to the rule you just cited, there is a rule which was set forth in the suspension "conduct prejudicial to good order" also. We need to find out whether that one is violative because that's part of the state statute.

THE COURT: I think it is for overbreadth and [11] vague-

ness. And, of course, as I understant it, under the record in this case contrary to the good order - what's the language.

MR. RORSCHACH: Conduct prejudicial to good order.

THE COURT: Conduct prejudicial to good order. The only conduct was in conversation, as I understand it, which is the infringement of First Amendment rights and I do think it's overbroad.

* * * * *

HEARING CONCLUDED.

NO. 80 - 275

Supreme Court, U.S.
FILED
SEP 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT MICHAEL DAVIS, ET AL.
Petitioners,

VERSUS

LEWIS WILLIAMS, ET AL.
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

DONALD JACKSON RORSCHACH
ROBERT STEPHEN Mc GRATH
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ATTORNEYS FOR RESPONDENTS

QUESTIONS PRESENTED

That a certain provision proscribing "Conduct Prejudicial to Good Order" is not void and facially - always and however applied - invalid.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 2

Reasons for Denying Writ:

Decision of Fifth Circuit is Correct 3

Issues Involved are not "Certworthy" 5

Abstention 6

Conclusion 8

Certificate of Service 9

TABLE OF AUTHORITIES

Arnett v. Kennedy, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974) 3, 4, 5

Article 1269m V.A.T.S. 3

Bence v. Breier, 501 F. 2d 1185 (7th Cir. 1974) cert. denied, 419 U.S. 1121, 95 S. Ct. 804, 42 L. Ed. 2d 821 (1975) 5, 6

Bolieu v. Firemen's and Policemen's Civil Service Commission, 330 S. W. 2d 234, 236 Tex. Civ. App. – San Antonio 1959) writ refused no reversible error 4

Byrd v. Gain, 558 F. 2d 553 (9th Cir. 1977) 6

City of Lubbock v. Estrello, 581 S. W. 2d 288 (Tex. Civ. App. – Amarillo 1979) writ refused no reversible error 4

City of Wichita Falls v. Fowler, 555 S. W. 2d 920 (Tex. Civ. App. – Ft. Worth 1977) no writ history 4

City of Wichita Falls v. Harris, 532 S. W. 2d 653 (Tex. Civ. App. – Ft. Worth 1975) writ refused no reversible error 4

Janusaitis v. Middlebury Volunteer Fire Department, 607 F. 2d 17 (2nd Cir. 1979) 6

Juidice v. Vail, 430 U.S. 327, 337, 97 S. Ct. 1211, 51 L.Ed. 2d 376 (1977) 7

TABLE OF AUTHORITIES CONTINUED

Page

Kannisto v. City and County of San Francisco, 541 F. 2d 841 (9th Cir. 1976) certiorari denied 430 U.S. 931, 97 S. Ct. 1552, 51 L. Ed. 2d 775 (1977) 6

Lloyd-LaFollette Act, 5 U.S.C. Sec. 7501 3

Moore v. Sims, 442 U.S. 415, 99 S. Ct. 2371, 60 L. Ed 2d 994 (1979) 4, 6

Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974) 4, 5,

United States Constitution Article III Sec. 1 5

NO. 80-275

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT MICHAEL DAVIS, ET AL.

Petitioners,

VERSUS

LEWIS WILLIAMS, ET AL.

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents herein respectfully request that this court deny the petition for writ of certiorari, seeking review of the 16 - 7 en banc decision of the Fifth Circuit and Respondents hereby submit a short, concise basis for such a denial.

STATEMENT OF THE CASE

Petitioners seek to invoke the discretionary jurisdiction of this Honorable Court to obtain an advisory opinion on an academic question. Neither of the individuals involved originally are currently involved. Respondent Williams, the fire chief who sought Petitioner Davis' dismissal, has been replaced and Petitioner Davis has voluntarily left the Fire Department to pursue his career as a home builder.

The issue to be reviewed by the Fifth Circuit was limited to the narrow question of whether the specific language involved was facially unconstitutional. That issue having been resolved in favor of the validity of the language, any real controversy of public importance has left the case.

Respondents approve of the fact statement contained in the majority opinion issued by the Fifth Circuit but would emphasize that those facts are not before this Court. The only question decided by the Fifth Circuit was the facial validity of "conduct prejudicial to good order." That is, that such language is not always and however applied invalid.

REASONS FOR DENYING WRIT

DECISION OF FIFTH CIRCUIT IS CORRECT

This Court's decision in *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed 2d 15 (1974) dealt with the discharge of a non-military employee of the government whose continued employment was protected by the provisions of the Lloyd-LaFollette Act 5 U.S.C. Sec. 7501. The case at bar likewise deals with the discharge of an employee whose continued employment was protected by statute. See Article 1269m V.A. T.S. It is the virtually identical language used to support the respective discharges that makes *Arnett* so closely analogous.

"Such cause as will promote the efficiency of the service" governing federal employee dismissals under the Lloyd-La-Follette Act is seen by Petitioners as being supplemented by the regulations of the Civil Service Commission and by the regulations and instructions of the particular agency involved, thereby distinguishing *Arnett*, supra, from the case at bar. Such is simply not true.

Arnett at footnotes 5 and 6 quote the following regulations:

> "An employee shall not engage in criminal, infamous, dishonest, immoral or notoriously disgraceful conduct or OTHER CONDUCT PREJUDICIAL TO THE GOVERNMENT." 5 C.F.R. Section 735.209 (Emphasis added)
>
> "No employee shall engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct OR OTHER CONDUCT PREJUDICIAL TO THE GOVERNMENT." 45 C.F.R. 1015. 735-24 (Emphasis added)

Common to each of the quoted regulations and to the case at bar is the "CONDUCT PREJUDICAL" language. *Arnett* therefor is strong, direct authority that the language used to protect Irving Fire Department employees from groundless discharge is a sufficient statement of regulated conduct, as the Fifth Circuit recognized.

Arnett v. Kennedy, supra, has been cited and followed by the Texas Appellate Courts who are the principal expositors of state law. *Moore v. Sims*, 442 U.S. 415, 99 S. Ct. 2371, 60 L. Ed 2d 994 (1979). In *City of Wichita Falls v. Fowler* 555 S. W. 2d 920 (Tex. Civ. App. – Ft. Worth), no writ history, the Court reasoned that *Parker v. Levy* 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed 2d 439 (1974) and *Arnett*, supra, were controlling and denied the fireman's challenge of the identical language involved in the case at bar.

This same language again came before the Texas Appellate Courts in *City of Lubbock v. Estrello*, 581 S.W. 2d 288 (Tex. Civ. App. – Amarillo 1979) writ refused no reversible error. Again the "conduct prejudicial to good order" regulation was upheld. See also *City of Wichita Falls v. Harris*, 532 S. W. 2d 653 (Tex. Civ. App. – Ft. Worth, 1976) writ refused no reversible error, and *Bolieu v. Firemen's and Policemen's Civil Service Commission*, 330 S. W. 2d 234, 236 (Tex. Civ. App. – San Antonio 1959) writ refused no reversible error, each upholding the validity of the provision at issue in the case at bar.

The Fifth Circuit correctly notes that *Arnett*, supra, and *Parker*, supra, both well reasoned decisions of this Honorable Court, have set the limits within which the case at bar clearly falls. *Arnett* on one end of the scale upholds the discharge of an OEO civilian employee and *Parker* on the other end of the scale upholds the discharge of military personnel.

Petitioner Davis was not a soldier, nor was he a mere civilian

employee. There seems to be some reluctance to call the Irving Fire Department "quasi-military" but by whatever name it is described, the need for esprit de corps and discipline within the department clearly brings this case somewhere inside the "book-end" decisions of *Arnett* and *Parker*.

It was dramically noted during oral argument before the en banc Fifth Circuit Court that the United States Constitution, the instrument being used to challenge the language involved, employs at Article III Sec. 1, what could be considered a far more general description of conduct to be expected of members of the federal Judiciary: "The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behavior. . . ." Are we to say in light of Article III Sec. 1 that the Constitution somehow requires this Court to declare "conduct prejudicial to good order" facially-always and however applied-invalid?

ISSUES INVOLVED ARE NOT "CERTWORTHY"

As stated previously Petitioners seek an advisory opinion on an academic question. The case no longer contains any live issues in that the *former* fireman affected by the action of the *former* fire chief has no continuing interest in the case and has no interest in even any future, imagined action of the present fire chief.

Petitioners hold up but one, six year old decision from the Seventh Circuit which invalidated certain other language as that language was used to regulate the conduct of policemen in Milwaukee. The issues involved there were, subsequent to *Arnett*, supra, and *Parker*, supra, determined not to be "certworthy." *Bence v. Breier*, 501 F. 2d 1185 (7th Cir. 1974) cert. denied, 419 U.S. 1121, 95 S. Ct. 804, 42 L. Ed. 2d 821 (1975).

That one Seventh Circuit decision has also been discredited

by subsequent Circuit Court opinions. See *Byrd v. Gain* 558 F. 2d 553 (9th Cir. 1977) and *Kannisto v. City and County of San Francisco*, 541 F. 2d 841 (9th Cir. 1976) certiorari denied 430 U.S. 931, 97 S. Ct. 1552, 51 L. Ed 2d 775 (1977) both upholding similar regulations dealing with policemen in San Francisco, and *Janusaitis v. Middlebury Volunteer Fire Department*, 607 F. 2d 17 (2nd Cir. 1979) upholding the dismissal of a fireman in Connecticut. Each of these decisions uphold general statements of proscribed conduct and certiorari was denied in the only case in which it was applied for.

The denial of certiorari in *Bence*, supra, and the denial of certiorari in *Kannisto*, supra, are strong indications that the issue in the case at bar, particularly where such is devoid of any question as to the proper application of the language involved, is not of such compelling interest that the Supreme Court should exercise the jurisdiction which has been reserved for deciding questions of significant public interest and importance.

ABSTENTION

Although Petitioners allege a conflict of decisions between the various circuit courts, the conflict, if any, could well remain unresolved if this Honorable Court correctly analyzes the course of events that led this case into the federal court system.

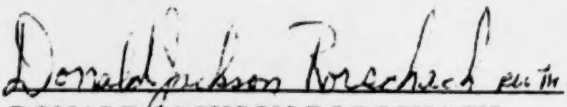
Petitioner Davis, an employee whose continued employment was protected by regulations promulgated pursuant to a *state* statute appealed his discharge to the Irving Civil Service Commission and to the *state* courts pursuant to the mandate of the *state* statute. According to a very recent restatement of the abstention doctrine Davis should not be in federal court. See *Moore v. Sims*, supra. As stated in *Moore*, the federal courts should not exert jurisdiction if the plaintiffs "had an *opportunity* to present their federal claims in the state proceeding." *Moore*, supra at 442 U.S. 425, 99 S. Ct. _____, 60 L. Ed 2d

1004, quoting from *Juidice v. Vail* 430 U.S. 327, 337, 97 S. Ct. 1211, 51 L. Ed 2d 376 (1977) (emphasis in original). Davis clearly had such an opportunity and did in fact assert his federal claim in the state courts. If this Honorable Court sees this as a basis for deciding the rights of these litigants, any alleged conflict of decisions would go unchanged. If the conflict would never be reached, it is difficult to see how that conflict can be the basis for invoking this Court's discretionary jurisdiction.

CONCLUSION

For these reasons the petition for writ of certiorari should be denied.

Respectfully submitted,



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I certify that a true and correct copy of the foregoing Brief in Opposition has been deposited, postage paid, in the United States Mail addressed to Petitioner as follows:

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NO. 80-275

Supreme Court, U. S.
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IN THE

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OCTOBER TERM, 1980

ROBERT MICHAEL DAVIS AND THE IRVING PROFESSIONAL FIREFIGHTERS ASSOCIATION
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VERSUS

LEWIS WILLIAMS, THE IRVING FIREMEN'S AND POLICEMEN'S CIVIL SERVICE COMMISSION AND THE CITY OF IRVING, TEXAS
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether certain catchall provisions of a municipal ordinance and of fire department regulations which mandate suspension or discharge of employees for engaging in "conduct prejudicial to good order" are vague, overbroad or otherwise facially unconstitutional.

INDEX

Page

Question Presented i

Citations iii

Applicable Rules, Regulations and Statutes Irving Department of Fire Rules & Regulations 1

Petitioners' Reply to Respondents' Statement of the Case 3

Petitioners' Reply to Respondents' Reasons for Denying the Writ 4

I. The Decision of the Fifth Circuit is Incorrect 4

II. The Issues Involved Justify the Granting of a Writ of Certiorari 4

III. Abstention 6

Conclusion 7

Certificate of Service 8

CITATIONS

Page

CASES:

Bence v. Breier, 501 F. 2d 1185 (7th Cir. 1974) 4, 5

Brown v. Liberty Loan Company, 539 F. 2d 1355 (5th Cir. 1976) 7

Hamtramck Civil Service Commission v. Pitlock, 205 N. W. 2d 293 (Mich. 1973) 4

Kannisto v. City and County of San Francisco, 541 F. 2d 841 (9th Cir. 1976) 5

Marshall v. Soyer, 301 F. 2d 639 (9th Cir. 1962) 7

Moore v. Sims, 442 U. S. 415 (1979) 6

Zablocki v. Redhail, 434 U. S. 374 (1978) 6

Miscellaneous

Field, *Abstention in Constitutional Cases*, 122 U. PA. L. REV. 1071, 1080 - 1084 (1974) 7

Articles

TEX.REV. CIV. STAT. art. 1269m 3, 6

Statutes

42 U. S. C. § 1983 6

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LEWIS WILLIAMS, THE IRVING FIREMEN'S AND
POLICEMEN'S CIVIL SERVICE COMMISSION AND
THE CITY OF IRVING, TEXAS

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

APPLICABLE RULES, REGULATIONS AND STATUTES
IRVING DEPARTMENT OF FIRE RULES & REGULATIONS

* * * * *

ARTICLE 5.5 OFFENSES

Offenses are punishable by reprimand, reduction in rank, suspension, or dismissal.

A. Offenses

* * * * *

(14) Violation of any of the Rules, Regulations, or Procedures of the Fire Department; Article 1269m V.A.T.C.S.; City of Irving Ordinance 2201; City Ordinances; Personnel Policies and Procedures of the City of Irving; and County, State, or Federal laws.

* * * * *

SECTION 5. . . . The Commission shall make such rules and regulations for the proper conduct of its business as it shall find necessary and expedient, provided that no rules or regulations shall ever be adopted which will permit the appointment or employment of any person without good moral character; or any person unfit mentally or physically; or any person incompetent to discharge the duties of such appointment or employment. Such rules and regulations shall prescribe what shall constitute cause for removal or suspension of Firemen or Policemen, but no rule for the removal or suspension of such employees shall be valid unless it involves one or more of the following grounds:

Conviction of a felony or other crime involving moral turpitude; violations of the provisions of the charter of said city; acts of incompetency; neglect of duty; discourtesy by said

employee to the public or to fellow employees while said employee is in line of duty; acts of said employees showing a lack of good moral character; drinking of intoxicants while on duty, or intoxication while off duty; or whose conduct was prejudicial to good order; refusal or neglect to pay debts; absence without leave; shirking duty, or cowardice at fires; violation of any of the rules and regulations of the Fire Department or Police Department or of special orders, as applicable.

PETITIONERS' REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Petitioners take issue with Respondents' characterization of the issue presented this Court as an academic one. (Respondents' Brief in Opposition p. 2). Fire Department employees of the City of Irving continue to work under the proscription against "conduct prejudicial to good order." Specifically, Article 5.4 A. 14 of the Irving Fire Department Rules and Regulations denominates as an offense, punishable by reprimand, reduction in rank, suspension or dismissal, the violation of TEX.REV.CIV.STAT.ANN. art. 1269m. In turn, Section 5 of Article 1269m authorizes the removal or suspension of a Fire Department employee for engaging in conduct prejudicial to good order. Thus, this impalpable standard continues to work its chilling effect upon the speech of Irving city employees. Respondents' statement that "any real controversy of public importance has left the case" (Respondents' Brief in Opposition p. 2) belies the continuing vitality of this vague and overbroad provision.

Additionally, Respondents note that none of the individuals involved orginally or currently involved in this suit. (Respondents' Brief in Opposition p. 2). Respondents fail to mention, however, that the membership of the Irving Firefighters Association, a co-plaintiff in the Court below and co-petitioner in this Court, will be directly affected by the outcome of this petition and, therefore, continue to maintain an active interest in this controversy.

PETITIONERS' REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE FIFTH CIRCUIT IS INCORRECT

Petitioner relies primarily upon the reasoning of the dissenting opinion of Judge Rubin in ***Davis v. Williams*** (Petitioners' Brief Appendix p. A-13) and the opinion of the Seventh Circuit in ***Bence v. Breier,*** 501 F. 2d 1185 (7th Cir. 1974), in support of Petitioners' assertion that the decision of the ***en banc*** majority in Davis is incorrect. In the interest of brevity, however, the arguments contained therein will not be repeated here.

Respondents cite several decisions of the Texas Courts involving proscriptions against "conduct prejudicial to good order." (Respondents' Brief in Opposition p. 4). Petitioners would respectfully ask this Court to compare these decisions with those of other jurisdictions striking down similar provisions as unconstitutionally vague and overbroad. e. g., ***Hamtramck Civil Service Commission v. Pitlock***, 205 N. W. 2d 293 (Mich. 1973). These conflicting decisions highlight the need for guidance from this Honorable Court on the question presented.

II.

THE ISSUES INVOLVED JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI

Petitioners again take issue with Respondents' statement that the question presented this Court is merely an academic one. (Respondents' Brief p. 5). The membership of the Irving Firefighters Association, a co-petitioner in this case, continues

to be affected by the City of Irving's vague and overbroad provision proscribing "conduct prejudicial to good order." (See Petitioners' Reply pages 1 and 2).

Additionally, Respondents state that the decision of the Seventh Circuit in ***Bence*** has been "discredited." (Respondents' Brief in Opposition p. 5). Petitioners acknowledge that the opinions of other circuits do indeed conflict with the decision of the Seventh Circuit in ***Bence.*** significantly, the Rules of the United States Supreme Court cite the existence of such conflict as a persuasive reason for the issuance of a writ of certiorari. Thus, Petitioners have no quarrel with this portion of Respondents' Brief in Opposition.

Respondents also note that writ of certiorari was denied in ***Bence***. (Respondents' Brief in Opposition p. 5). However, when Petitioner Bence filed his application for a writ of Certiorari in 1973 there were no Circuit Court decisions directly in conflict on the issue of facial invalidity. Today, the decision of the Fifth Circuit in ***Davis v. Williams*** stands diametrically opposite the Seventh Circuit's decision in ***Bence***. Thus, Respondents' implied argument that writ of certiorari should be denied in this case because writ of certiorari was denied in ***Bence*** simply is not tenable.

Additionally, Respondents cite ***Kannisto v. City and County of San Francisco***, 541 F. 2d 841 (9th Cir. 1976), ***cert. den.*** 430 U. S. 931 (1977), and again imply that this Court's denial of certiorari in that case should serve as a basis for such denial in the case ***sub judice***. (Respondents' Brief in Opposition p. 6). The ***Kannisto*** case, however, did not involve the issue of facial and unconstitutionality. Indeed, the Ninth Circuit held that "since the regulation clearly applies to Kannisto's conduct, he cannot challenge it for facial vagueness." ***Kannisto*** at 845. Thus, the instant petition for writ of certiorari differs significantly from that in ***Kannisto***.

III.

ABSTENTION

Initially, it should be noted that Respondents have taken certain liberties with the chronology of this litigation that are easily rebutted in the record. For example, Respondents allege that "Davis clearly had [an opportunity to present his federal claim in a state proceeding] and did in fact assert his federal claim in the state courts." (Respondents' Brief in Opposition p. 17). This simply is not true.

Appellee Davis was indefinitely suspended by Chief Williams on October 13, 1976. Suit was filed in Federal District Court on October 20, 1976, seeking declaratory and injunctive relief. At the time such suit was filed, ***there was no pending state action on file.*** Davis, pursuant to the Texas Civil Service Act, TEX. REV. CIV. STAT. art. 1269m, did request a review of the Chief's actions before the Irving Firemen's & Policemen's Civil Service Board. However, the Civil Service Board does not have the power to rule on the constitutional validity of its own rules and regulations. Its authority is merely to determine the factual accuracy of the allegations made in support of the disciplinary action. Thus, the line of cases cited by Respondents, culminating in *Moore v. Sims*, 442 U. S. 415 (1979), are not in point. Moreover, the abstention doctrine has never been held to limit determination of claims under 42 U. S. C. §1983. In *Zablocki v. Redhail*, 434 U. S. 374 (1978), this Court stated the issue as follows:

> "Absent issues of state law that might affect the posture of the federal constitutional claims - this Court has uniformally held that individuals seeking relief under 42 U. S. C. § 1983 need not present their federal, constitutional claims in state court before coming to a federal forum."

See also, ***Brown v. Liberty Loan Company***, 539 F. 2d 1355 (5th Cir. 1976); ***Marshall v. Soyer***, 301 F. 2d 639 (9th Cir. 1962) and Field, ***Abstention in Constitutional cases***, 122 U. PA. L. REV. 1071, 1080-1084 (1974).

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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I, FREDERICK M. BARON, hereby certify that I served a true and correct copy of the foregoing Petitioners' Reply to Respondents' Brief in Opposition on counsel for all parties to this appeal, by mailing copies thereof by ordinary postage, prepaid addressed to Mr. Donald J. Rorschach, City Attorney, 825 West Irving Boulevard, Irving, Texas 75060, Attorney for Respondents.

Frederick M. Baron

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